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UNITED STATES OF AMERICA,  
Appellant

) IN THE COURT OF MILITARY  
) COMMISSION REVIEW  
)

) APPELLEE'S MOTION TO STAY THE  
) PROCEEDINGS PENDING ADDITIONAL  
) JUDICIAL DISCLOSURES CONCERNING  
) *EX PARTE* COMMUNICATIONS WITH  
) COUNSEL FOR APPELLANT AND  
) MOTION FOR ADDITIONAL JUDICIAL  
) DISCLOSURES CONCERNING *EX PARTE*  
) COMMUNICATIONS WITH COUNSEL FOR  
) APPELLANT  
)

) CASE No. 07-001  
)

v. )

) Hearing Held<sup>1</sup> at Guantanamo Bay, Cuba on 4  
) June 2007

) Before a Military Commission

OMAR AHMED KHADR,  
Appellee

) Convened by MCCO # 07-02

) Presiding Military Judge

) Colonel Peter E. Brownback III  
)

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**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY  
COMMISSION REVIEW**

**Relief Sought**

Omar Khadr ("Appellee") respectfully requests that this Court stay the proceedings pending additional judicial disclosures concerning Captain Rolph's *ex parte* communications with counsel for Appellant. Specifically, Appellee seeks disclosure of Captain Rolph's emails with military commission prosecutors and other contents of his "military commission file" that he offered to provide to Naval Criminal Investigative Service Special Agent [REDACTED] during an interview conducted on 8 April 2004.

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<sup>1</sup> Appellee has yet to be arraigned.

## Facts<sup>2</sup>

At 1716 on 22 August 2007, the Court notified Appellee's counsel that they could review, at the office of prosecutor Captain Petty, the tape recorded interview that Special Agent [REDACTED] of Defense Criminal Investigative Service conducted with Captain John W. Rolph on 8 April 2004, referred to in Exhibit 27 to the Inspector General's Report of Investigation, dated 30 April 2004 ("IG Report"), as well as a copy of the 15 March 2004 email from [REDACTED] referred to in Exhibit 27, which contained allegations regarding Captain Rolph's involvement with the Office of Military Commissions.

Counsel were unable to review the tape and email this morning due to preparation for the argument scheduled for tomorrow morning. With the permission of the Court, counsel sent another officer in the Office of the Chief Defense Counsel to review the materials and report back to them. Based on his preliminary review, counsel for Appellant went to the Office of the Chief Prosecutor at approximately 1500 today to review the transcript of the tape, listen to the tape and review the [REDACTED] email. Therefore, this evening is counsels' first opportunity to file this motion with the Court.

The [REDACTED] email was written by [REDACTED] a former military commission prosecutor to [REDACTED] and others. In her email, [REDACTED] expresses concern over contacts between Captain Rolph and military commission prosecutors. She states that "In response to points raised regarding potential defense challenges, I often hear [REDACTED] say one of 2 things: . . . 2. Rolfs [sic] won't let them go there." She goes on to say, "Finally, when you say things like 'these panels aren't going to

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<sup>2</sup> The facts relating to the content of the IG Report are based largely on review by Appellee's counsel of the transcript and tape of Special Agent [REDACTED] of Defense Criminal Investigative Service conducted with Captain John W. Rolph on 8 April 2004 and the 15 March 2004 email from Captain [REDACTED] referred to in Exhibit 27 to the Inspector General's Report of Investigation, dated 30 April 2004.

acquit’ or ‘the panel members are being carefully chosen’ in response to concerns about how certain pieces of evidence will play, it leads me to question whether these proceedings will truly be fair.”

The Special Agent did not ask direct questions about [REDACTED]’s allegations during his interview of Captain Rolph. Instead, he merely read part of the email and asked Captain Rolph to respond generally. Captain Rolph’s response is generally summarized in paragraph 28 of the IG Report. Captain Rolph, did, however, additionally suggest during the course of the interview that he was not (or would not be) detailed as presiding officer, even though he had been nominated, because of his contacts with the Office of Chief Prosecutor.

### **Argument**

#### **This Court should make the requested disclosures.**

The Court should disclose the content of *ex parte* communications. *See, e.g., United States v. Martinez*, 40 M.J. 82 (C.M.A. 1994). Moreover, in the course of this litigation, this Court has itself acknowledged the propriety of disclosing information relating to communications of this type. The Court initiated the practice by disclosing *sua sponte* the fact of Captain Rolph’s contact with an OGC attorney, in which Captain Rolph questioned the validity of appointments to the Court made by the Deputy Secretary of Defense. (*See Disclosure Concerning Motion to Abate and Motion to Attach Documents*, dated 23 July 2007.) The Court then granted Appellee’s request for additional disclosure relating to these contacts, to include production of the text of emails between Captain Rolph and OGC attorney, Paul Ney, in which Mr. Ney communicated, *inter alia*, the Appellant’s legal position on why the appointments were proper. (*See Ruling on Request for Additional Judicial Disclosure*, dated 30 July 2007.)

Appellant has followed the Court's lead. Appellant saved the Court the trouble of granting Appellee's initial motion to compel production of documents relating to Captain Rolph's contacts with military commission prosecutors. It provided the documents without opposition. It additionally provided the tape recording and redacted copy of [REDACTED] email without opposition. Thus, the Court and Appellant have implicitly acknowledged that the nature and extent of such contacts must be fully disclosed to the parties so as to provide an adequate opportunity to "explore the impact" of the communications and to develop an appropriate record for review. *See Martinez*, 40 M.J. at 83. Moreover, disclosure is necessary to prevent Appellee from being placed at an unfair disadvantage vis-à-vis counsel for Appellant, who have greater knowledge of the substance of these contacts.

[REDACTED] and others suggests that Captain Rolph in effect coordinated with prosecutors concerning the conduct of military commission proceedings and in dealing with "defense challenges." Discovery of this new information heightens the need for full disclosure of the nature and extent of the contacts between Captain Rolph and military commission prosecutors. In light of [REDACTED] expressed concerns about Captain Rolph's communications with prosecutors – based on conversations with the Chief Prosecutor – and their impact on the fairness of the process, the perceived legitimacy of these proceedings is reasonably called into question absent complete disclosure. Moreover, Captain Rolph offered to provide these documents to investigators, thereby acknowledging that no privilege attached to the documents at issue.

For the reasons discussed above, Appellee has a right to discover the content of any such communications.


### Conclusion

Based on the foregoing, Appellee respectfully requests disclosure of Captain Rolph's emails with military commission prosecutors and other contents of his "military commission file that he offered to provide to Naval Criminal Investigative Service Special Agent [REDACTED] during an interview conducted on 8 April 2004. Appellee additionally requests a stay of proceedings pending receipt of this disclosure and the opportunity to evaluate whether grounds exist for Captain Rolph's disqualification and/or recusal.

Respectfully submitted,

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PANEL No. \_\_\_\_\_  
GRANTED (signature) \_\_\_\_\_  
DENIED (signature) \_\_\_\_\_  
DATE \_\_\_\_\_

### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D.

Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC,

USN on 23 August 2007.



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